

# Nadler Statement on Resolution of Inquiry on NSA Domestic Surveillance, H. Res. 643

Tuesday, 14 February 2006

WASHINGTON, D.C. – The House Judiciary Committee today held a markup of H. Res. 643, a resolution directing the Attorney General to submit to Congress all documents in his possession pertaining to warrantless wiretapping. Congressman Jerrold Nadler delivered the following statement in support of the measure:

“On December 16, 2005, the New York Times first reported that the National Security Agency (NSA) had been conducting warrantless wiretapping on American soil at the secret request of the President. The program turned the giant ear of the federal government inwards to listen to domestic communications. Despite the Bush Administration’s claim that only members of al Qaeda, individuals affiliated with it, or persons working with terrorists are being monitored, news reports suggest that perhaps thousands of innocent Americans are being spied upon.

“Warrantless domestic surveillance is illegal. There is a court precisely empowered to review applications for domestic surveillance to gather foreign intelligence. The Foreign Intelligence Surveillance Act (FISA) requires judicial approval of all electronic surveillance in this country in investigations to prevent international terrorism; or sabotage; or to monitor foreign spies.

“When President Bush decided to bypass the FISA court and ordered domestic surveillance without court approval, he broke the law. The law makes it a crime for government officials to engage in electronic surveillance under the color of law except as authorized by statute. FISA makes this crime punishable by a fine of not more than \$10,000 or imprisonment for not more than five years, or both.

“The President took an oath to preserve, protect and defend the constitution of the United States, and to take care that the laws be faithfully executed. When he acts outside the limits set by the constitution and contrary to the law, he engages in a criminal conspiracy against the United States, against the separation of powers, one of the chief pillars supporting our liberties, and against those liberties. This is a direct challenge to us. It is our responsibility, as members of the House of Representatives, to protect American liberties by investigating the President’s usurpations of power and to determine whether they constitute high crimes and misdemeanors in the constitutional sense. It would be a terrible dereliction of duty if we were to disregard this responsibility.

“The legal arguments the Administration makes in defense of this program are frivolous. FISA specifies that it is the exclusive means by which electronic surveillance may be conducted except as authorized by a statute. The President argues that the Authorization for the Use of Force (AUMF) resolution is a statute that does that. He relies on Hamdi v. Rumsfeld to find that his warrantless domestic surveillance program is constitutional because it is a fundamental incident of the use of force allowed by the statute. But there is no limit to this groundless interpretation.

Under this interpretation of the resolution, the President could suspend the writ of Habeas Corpus, reinstate the power to torture detainees, authorize breaking and entering without a warrant, or murder in the streets of the Capitol, if he thinks doing so would be helpful in defeating terrorism. In Hamdi, Justice O’Connor points out that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.

“We are all familiar with the basic rule of statutory construction that a specific law cannot be set aside by a general law, but only by a law that specifically and explicitly repeals or modifies it. Congress has clearly spoken on the question of domestic electronic surveillance in FISA-- and this specific and carefully drawn statute cannot be superseded by an asserted interpretation of the AUMF, which contains not a single page, not even a hint, that Congress intended to repeal FISA, or its exclusivity. In fact, there is legislative history that Congress refused to expand FISA to give

the president this kind of authority. The argument that the AUMF resolution permits warrantless domestic spying is, therefore, frivolous.

“The President also claims that he enjoys inherent constitutional authority, regardless of FISA, to conduct warrantless domestic surveillance because we are at war. He claims that as long as he is acting to protect national security, his inherent authority trumps the law. Devoid of any limiting principle, this claim asserts the monarchical doctrine that, with respect to war powers, Congress can place no limits on the Executive power. This logic could be applied to any action — unlawful surveillance today; it could be murder tomorrow.

“President Bush’s monarchical abuses, if left unchecked, will, as Justice Robert Jackson said, ‘lie around like a loaded gun and be utilized by any future incumbent who claims a need.’

“Finally, the question arises as to why the President believes it necessary to proceed without getting warrants from the FISA court. If the Administration is telling us the truth, and they are wiretapping only conversations between people in this country and suspected al Qaeda agents abroad, there would be no difficulty whatever in promptly getting FISA warrants whenever necessary. Logic, therefore, compels the conclusion that, as press reports suggest, the Administration is lying to us, and, in fact, is going well beyond what they have stated, into conduct for which they could not get FISA warrants.

“It may be that, if we were told the truth, we would amend FISA to permit what they are doing; or it may be that, if we were told the truth, we would find that my conclusions are mistaken; or it may be that, if we were told the truth, because of the shocking and dangerous nature of what would be revealed, we would never amend the law to permit such conduct to continue. We must know the facts. We must see the documents.

“I support this resolution of inquiry.”

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